Mission Richmark Sdn Bhd v Capitol Avenue Development Sdn Bhd

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-24NCvC-48/5 OF 2018
MAIRIN IDANG J
29 JULY 2020

Contract — Agreement — Sale and purchase agreement — Whether defendant as developer was obliged to deliver vacant possession of property within 36 months from date of obtaining building plans — Whether defendant owed plaintiff payment of agreed liquidated damages due to late delivery of vacant possession — Whether defendant was in breach of the sale and purchase agreements for wrongful deduction of agreed liquidated damages — Whether contractual date of delivery of vacant possession of property was lawfully extended under construction agreement — Whether the plaintiff was privy to the construction agreement

This was an application by way of originating summons (encl 1) for payment of agreed liquidated damages due to late delivery of vacant possession of properties to the plaintiff. The defendant was the developer of a stratified mixed commercial and residential development named 'Sutera Avenue'. By a master sale and purchase agreement dated 28 March 2013 and ten sale and purchase agreements all also dated 28 March 2013 ('the said agreements'), the plaintiff purchased from the defendant a ten storey shop offices/retails shops comprised in the building en bloc respectively described as unit Nos A-G-17, A-1–17, A-2–17, A-3–17, A-3A–17, A-5–17, A-6–17, A-7–17, A-8–17 and A-9–17, Block A ('the said property'). The total price of the said property was RM10.5m only. All the terms and conditions stipulated in the said agreements were almost identical, including all the relevant clauses governing time and manner of delivery of vacant possession as well as on the agreed liquidated damages entitlement. Clause 14.1.1 and section 10 of Schedule A of the said agreements provided that the defendant as the developer is obliged to deliver vacant possession of the said property within 36 months from the date of obtaining the building plans. In the instant case, the building plans were obtained on 24 September 2013. As such, by virtue of the aforementioned terms and conditions, the contractual date of delivery of vacant possession of the said property was 25 September 2016. Nonetheless, vacant possession of the said property was only delivered to the plaintiff on 28 August 2017. Due to such delay, the plaintiff sought to enforce the provisions on agreed liquidated damages stipulated in cl 14.1.2 and section 7 of Schedule A of the said agreements. In its pleadings, the plaintiff sought the following reliefs against the defendant: (a) declaration that the plaintiff was entitled to agreed liquidated damages for breach of contract calculated at the rate of 10%pa on

daily rest on the total purchase price of RM10.5m only from contractual date of delivery of vacant possession on 25 September 2016 to the date of delivery of vacant possession on 28 August 2017; (b) declaration that the defendant wasin breach of the sale and urchase agreements for wrongful deduction of agreed liquidated damages; (c) interest on the agreed liquidated damages at the agreed rate of 10%pa calculated from the date of delivery of vacant possession on 28 August 2017 to the date of full settlement of the agreed liquidated damages; (d) costs against the defendant; (e) an order that the defendant do and shall forthwith pay the plaintiff the agreed liquidated damages in the sum RM972,327.98, interest thereon the agreed liquidated damages and costs awarded; and/or (f) such consequential orders or further or other relief and orders that this honourable court deems fit and proper to grant. The defendant did not dispute the facts presented by the plaintiff with regards to the late delivery of vacant possession of the said property. However, the defendant sought to amplify the fact that the completion and date of delivery of vacant possession of the said property was subject to extension at the discretion of the developer's architect. In the present application, the defendant averred that the contractual date of delivery of vacant possession of the said property has been lawfully extended to 12 June 2017 ('the extended date of completion') by the developer's architect pursuant to cl 14.1.1 of the said agreements. According to the defendant, the extension of time was given by the developer's architect as there was a delay on the part of Sabah Electricity Sdn Bhd ('SESB') in supplying permanent power supply to the said property which consequently delayed the testing and commissioning ('T&C') and completion schedule. Such delay was submitted to be beyond the defendant's control.

Held, allowing the plaintiff's originating summons under encl 1 with costs of RM3,000:

(1) It was undisputed that there has been a delay in the delivery of the said property by the defendant to the plaintiff. It was also agreed that in the event of late delivery of vacant possession, the defendant must compensate the plaintiff with payment of liquidated damages to be calculated according to cl 14.1.2 read with section 7 of Schedule A of the said agreements. The court agreed with the plaintiff who submitted that the delay cannot be brought within the ambit of the proviso to cl 14.1.1 of the said agreements. The proviso which was also known as force majeure clause must not be construed liberally and widely enough to exclude the defendant of any liability of its contractors (see paras 10 & 14).

(2) The court found that the delay in delivery of the said property is for 338 days. Therefore, the computation of the agreed liquidated damages to the plaintiff will be in accordance to cl 14.1.2 and section 7 of Schedule A of the said agreements (see para 27).

(3) The court found no merit in this submission of the defendant. The certificate of extension of time was issued under the construction agreement which the plaintiff was not privy too. The provisions under which the certificate was issued are also distinct from cl 14.1.1 of the said agreements. The grounds of 'delay caused by appropriate authority and service provider' was not listed as one of the grounds to justify the delay in delivery of vacant possession under the said agreements. Therefore, the court failed to see how such certificate which was clearly issued under an agreement which the plaintiff was not privy to and for a distinct reason not provided in cl 14.1.1 of the said agreements, can be extended and deemed to have also been issued under cl 14.1.1 of the said agreements and therefore binding to the plaintiff and the defendant. The court found that to adopt such inclusive and liberal construction would subject the plaintiff to be without any recourse as the plaintiff is not privy to the construction agreement (see paras 22–23).

(4) The court found the deposition of the developer's architect in the defendant's affidavit in opposition No 2 and his explanation in exh 'WOWL3' in the defendant's supplementary affidavit in opposition to be an afterthought as it was a total departure from his previous explanation provided in the letter to learned counsel for the plaintiff ('TYC7') with no explanation. Hence, such deposition was unsatisfactory and unreliable. Since it was apparent that no certificate of extension of time had ever been issued under cl 14.1.1 of the said agreements, there was no necessity to venture into the issue of format or form for issuance of such certificate under the same clause (see paras 24–25).

[Bahasa Malaysia summary

Ini adalah permohonan melalui saman pemula ('lampiran 1') untuk pembayaran ganti rugi tertentu yang telah dipersetujui disebabkan kelewatan serahan milikan kosong hartanah kepada plaintif. Defendan adalah pemaju pembangunan komersial dan kediaman bercampur strata bernama 'Sutera Avenue'. Melalui perjanjian jual beli induk bertarikh 28 Mac 2013 dan sepuluh perjanjian jual beli kesemuanya yang juga bertarikh 28 Mac 2013 ('perjanjian tersebut'), plaintif telah membeli dari defendan kedai pejabat/kedai runcit sepuluh tingkat yang terdapat di dalam bangunan secara bersekali masing-masing dikenali sebagai unit No AG-17, A-1–17, A-2–17, A-3–17, A-3A-17, A-5–17, A-6–17, A-7–17, A-8–17 dan A-9–17, Blok A ('hartanah tersebut'). Jumlah keseluruhan harga hartanah tersebut adalah RM10.5 juta sahaja. Semua terma dan syarat yang dinyatakan dalam perjanjian tersebut hampir serupa, termasuk kesemua klausa yang relevan berkaitan masa dan cara penyerahan hak milikan kosong serta berkenaan dengan ganti rugi tertentu yang telah dipersetujui. Klausa 14.1.1 dan seksyen 10 Jadual A perjanjian tersebut memperuntukkan bahawa defendan sebagai pemaju bertanggungjawab untuk menyerahkan milikan kosong hartanah tersebut

dalam masa 36 bulan dari tarikh memperoleh pelan bangunan tersebut. Dalam kes semasa, pelan bangunan telah diperoleh pada 24 September 2013. Oleh itu, berdasarkan terma dan syarat yang disebutkan di atas, tarikh kontraktual penyerahan hak milikan kosong hartanah tersebut adalah pada 25 September 2016. Walau bagaimanapun, milikan kosong harta tersebut hanya diserahkan kepada plaintif pada 28 Ogos 2017. Oleh kerana kelewatan tersebut, plaintif memohon untuk menguatkuasakan peruntukan mengenai ganti rugi tertentu yang telah dipersetujui yang dinyatakan dalam klausa 14.1.2 dan seksyen 7 Jadual A perjanjian tersebut. Dalam plidingnya, plaintif memohon relif berikut terhadap defendan: (a) deklarasi bahawa plaintif berhak mendapat ganti rugi tertentu yang telah dipersetujui kerana melanggar kontrak yang dikira pada kadar 10% setahun pada kadar harian pada jumlah harga belian RM10.5 juta hanya dari tarikh kontraktual penyerahan hak milikan kosong pada 25 September 2016 hingga tarikh penyerahan hak milikan kosong pada 28 Ogos 2017; (b) deklarasi bahawa defendan melanggar perjanjian jual beli kerana pengurangan secara salah ganti rugi tertentu yang telah dipersetujui; (c) faedah ke atas ganti rugi tertentu yang dipersetujui pada kadar yang dipersetujui sebanyak 10% setahun yang dikira dari tarikh penyerahan hak milikan kosong pada 28 Ogos 2017 hingga tarikh penyelesaian penuh ganti rugi tertentu yang telah dipersetujui; (d) kos terhadap defendan; (e) perintah supaya defendan membuat dan dengan serta-merta membayar plaintif ganti rugi tertentu yang dipersetujui dalam jumlah RM972,327.98, faedah ke atas ganti rugi tertentu yang telah dipersetujui dan kos yang dibenarkan; dan/atau (f) perintah selanjutnya atau relif lain atau pelepasan dan perintah lain yang difikirkan sesuai dan wajar diberikan oleh mahkamah yang mulia ini. Defendan tidak membantah fakta yang dikemukakan oleh pihak plaintif berkenaan dengan kelewatan penyerahan hak milikan atas hartanah tersebut. Walau bagaimanapun, defendan berusaha untuk menguatkan fakta bahawa penyempurnaan dan tarikh penyerahan milikan kosong hartanah tersebut tertakluk kepada pelanjutan berdasarkan budi bicara arkitek pemaju. Dalam permohonan semasa, defendan menegaskan bahawa tarikh kontrak penyerahan hak milikan kosong hartanah tersebut telah dilanjutkan secara sah hingga 12 Jun 2017 ('tarikh lanjutan penyiapan') oleh arkitek pemaju menurut Klausa 14.1.1 perjanjian tersebut. Menurut defendan, lanjutan masa diberikan oleh arkitek pemaju kerana terdapat kelewatan pihak Sabah Electricity Sdn Bhd ('SESB') dalam pembekalan bekalan elektrik kekal ke hartanah tersebut yang mengakibatkan kelewatan pengujian dan pentauliahan ('T&C') dan jadual penyiapan. Kelewatan tersebut dikemukakan berada di luar kawalan defendan.

Diputuskan, membenarkan saman pemula plaintif di bawah lampiran 1 dengan kos RM3,000:

(1) Ianya tidak dipertikaikan bahawa terdapat kelewatan dalam penyerahan hartanah tersebut oleh defendan kepada plaintif. Ia juga telah

dipersetujui bahawa sekiranya berlaku kelewatan penyerahan milikan kosong, defendan harus membayar kepada plaintif dengan pembayaran ganti rugi tertentu yang akan dikira menurut klausa 14.1.2 dibaca dengan seksyen 7 Jadual A perjanjian tersebut. Mahkamah bersetuju dengan plaintif yang mengemukakan bahawa kelewatan tersebut tidak dapat dibawa di dalam peruntukan klausa 14.1.1 perjanjian tersebut. Ketetapan yang juga dikenali sebagai klausa *force majeure* tidak boleh ditafsirkan secara bebas dan meluas untuk mengecualikan defendan dari sebarang tanggungjawab kontraktornya (lihat perenggan 10 & 14).

(2) Mahkamah mendapati bahawa kelewatan serahan hartanah tersebut adalah selama 338 hari. Oleh itu, pengiraan ganti rugi tertentu yang telah dipersetujui kepada plaintif adalah bersesuaian dengan klausa 14.1.2 dan seksyen 7 Jadual A perjanjian tersebut (lihat perenggan 27).

(3) Mahkamah tidak mendapati sebarang merit dalam penghujahan oleh defendan. Sijil perakuan lanjutan masa telah dikeluarkan di bawah perjanjian pembangunan yang mana plaintif bukanlah pihak. Ketetapan di mana perakuan tersebut dikeluarkan juga berbeza dari klausa 14.1.1 perjanjian tersebut. Alasan 'delay caused by appropriate authority and service provider' tidak disenaraikan sebagai salah satu alasan untuk membenarkan kelewatan penyerahan hak milikan kosong berdasarkan perjanjian tersebut. Oleh itu, mahkamah gagal melihat bagaimana perakuan yang dikeluarkan dengan jelas di bawah perjanjian yang plaintif bukanlah pihak dan dengan alasan yang berbeza yang tidak diperuntukkan dalam klausa 14.1.1 perjanjian tersebut, dapat diperluaskan dan dianggap telah dikeluarkan di bawah klausa 14.1.1 perjanjian tersebut dan oleh itu mengikat plaintif dan defendan. Mahkamah mendapati bahawa untuk menggunakan konstruksi bebas dan meluas seperti itu akan menyebabkan plaintif tanpa jalan keluar kerana plaintif bukanlah pihak kepada perjanjian pembangunan (lihat perenggan 22–23).

(4) Mahkamah mendapati bahawa penyataan arkitek pemaju dalam afidavit menentang No 2 dan penjelasannya dalam ekshibit 'WOWL3' dalam afidavit menentang tambahan defendan sebagai pemikiran semula kerana ia adalah tersimpang jauh dari penjelasan sebelumnya yang diberikan dalam surat kepada peguamcara yang bijaksana untuk plaintif ('TYC7') tanpa penjelasan. Oleh itu, penyataan sedemikian tidak memuaskan dan tidak boleh dipercayai. Oleh kerana dengan jelas bahawa tidak ada sijil perakuan lanjutan masa yang pernah dikeluarkan berdasarkan klausa 14.1.1 perjanjian tersebut, maka tidak ada keperluan untuk membicarakan isu format atau borang untuk mengeluarkan sijil perakuan tersebut di bawah klausa yang sama (lihat perenggan 24–25).]

Cases referred to

Araprop Development Sdn Bhd v Leong Chee Kong & Anor [2008] 1 MLJ 783, CA (refd)

Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd [1989] 2 MLJ 70, CA (refd)

Grace Chaw (Grace Chaw & Co) for the plaintiff.
Alvin Leong (Leong & Wong) for the defendant.

Mairin Idang J:

[1] This is an application by way of originating summons (encl 1) for payment of agreed liquidated damages due to late delivery of vacant possession of properties to the plaintiff. I allowed this application under encl 1 with costs of RM3,000 to the plaintiff and this is my grounds of judgment.

SALIENT FACTS

[2] The defendant is the developer of a stratified mixed commercial and residential development named 'Sutera Avenue'. By a master sale and purchase agreement dated 28 March 2013 and ten sale and purchase agreements all also dated 28 March 2013 ('the said agreements'), the plaintiff purchased from the defendant a ten storey shop offices/retails shops comprised in the building en bloc respectively described as Unit No A-G-17, A-1–17, A-2–17, A-3–17, A-3A-17, A-5–17, A-6–17, A-7–17, A-8–17 and A-9–17, Block A ('the said property'). The total price of the said property is RM10.5m only.

[3] Save for the description of property, all the terms and conditions stipulated in the said agreements are almost identical, including all the relevant clauses governing time and manner of delivery of vacant possession as well as on the agreed liquidated damages entitlement.

[4] Clause 14.1.1 and section 10 of Schedule A of the said agreements provide that the defendant as the developer is obliged to deliver vacant possession of the said property within 36 months from the date of obtaining the building plans. For ease of reference, cl 14.1.1 and section 10 of Schedule A of the said agreements are produced in verbatim as follows:

Clause 14.1.1

> The Developer shall complete and deliver vacant possession of the said Parcel in accordance with the terms and conditions of this agreement within the period stated in Section 10 of Schedule A hereto PROVIDED THAT if in the opinion of the Developer's architect completion or delivery of vacant possession of the said Parcel is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any other cause beyond the Developer's control or by

reason of the Purchaser requiring the execution of any addition, works or alterations to the said Parcel, then in any such cases, the Developer's architect shall make a fair and reasonable extension of time for completion of the said Parcel and delivery of vacant possession hereunder.'

Section 10 of Schedule A

Section	Item	Particulars
10	Time for delivery of vacant possession	Thirty-six (36) calendar months from the date of the building plans having been obtained.

[5] In this instant case, the building plans were obtained on 24 September 2013. As such, by virtue of the aforementioned terms and conditions, the contractual date of delivery of vacant possession of the said property is 25 September 2016. Nonetheless, vacant possession of the said property was only delivered to the plaintiff on 28 August 2017. Due to such delay, the plaintiff sought to enforce the provisions on agreed liquidated damages stipulated in cl 14.1.2 and section 7 of Schedule A of the said agreements. These provisions are quoted in verbatim as follows:

Clause 14.1.2

In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under Clause 14.1.1 the Developer shall pay to the Purchaser liquidated damages to be calculated from day to day at the Agreed Rate on such part of the Purchase Price that has been paid by the Purchaser to the Developer and such sums shall be calculated from the date of expiry of the period stated in Section 10 of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser.

Section 7 of Schedule A

Section	Item	Particulars
7	Agreed rate	Ten per cent (10%) per annum on daily rests (before as well as after court order or judgment)

[6] In its pleadings, the plaintiff sought the following reliefs against the defendant:

(a) a declaration that the plaintiff is entitled to agreed liquidated damages for breach of contract calculated at the rate of 10%pa on daily rest on the total purchase price of Ringgit Malaysia ten million and five hundred

thousand (RM10.5m) only from contractual date of delivery of vacant possession on 25 September 2016 to the date of delivery of vacant possession on 28 August 2017;

(b) a declaration that the defendant is in breach of the sale and purchase agreements for wrongful deduction of agreed liquidated damages;

(c) interest on the agreed liquidated damages at the agreed rate of 10%pa calculated from the date of delivery of vacant possession on 28 August 2017 to the date of full settlement of the agreed liquidated damages;

(d) costs against the defendant;

(e) an order that the defendant do and shall forthwith pay the plaintiff the agreed liquidated damages in the sum of Ringgit Malaysia nine hundred seventy two thousand three hundred twenty seven and cents ninety eight (RM972,327.98) only, interest thereon the agreed liquidated damages and costs awarded; and/or

(f) such consequential orders or further or other relief and orders that this honourable court deems fit and proper to grant.

THE DEFENCE

[7] The defendant did not dispute the facts presented by the plaintiff with regards to the late delivery of vacant possession of the said property. However, the defendant sought to amplify the fact that the completion and date of delivery of vacant possession of the said property is subject to extension at the discretion of the developer's architect.

[8] In this present application, the defendant averred that the contractual date of delivery of vacant possession of the said property has been lawfully extended to 12 June 2017 ('the extended date of completion')by the developer's architect pursuant to cl 14.1.1 of the said agreements. According to the defendant, the extension of time was given by the developer's architect as there was a delay on the part of Sabah Electricity Sdn Bhd ('SESB') in supplying permanent power supply to the said property which consequently delayed the testing and commissioning ('T&C') and completion schedule. Such delay was submitted to be beyond the defendant's control.

[9] Moreover, since vacant possession of the said property was only delivered to the plaintiff on 14 August 2017, there was a delay of 62 days only from the extended date of completion to the actual date of delivery. Thus, the plaintiff is only entitled to the agreed liquidated damages in the sum of RM172,988.49 which the plaintiff has been adequately compensated vide a letter dated 19 September 2017.

A FINDINGS OF THIS COURT

[10] It was undisputed that there has been a delay in the delivery of the said property by the defendant to the plaintiff. It was also agreed that in the event of late delivery of vacant possession, the defendant must compensate the plaintiff with payment of liquidated damages to be calculated according to cl 14.1.2 read with section 7 of Schedule A of the said agreements. In fact, the plaintiff admitted having received the sum of RM172,988.49 as compensation for the late delivery of the said property from the defendant. The defendant derived such amount with the calculation provided in the said clause of the said agreements. Therefore, it can be deduced that parties also do not dispute the method of calculation of agreed liquidated damages.

[11] I find that the main dispute is the number of days of delay in the delivery of vacant possession. The plaintiff asserted that there was a delay of 338 days whereas the defendant argued that the delay was only for 62 days, taking into account the extension of time allegedly granted by the developer's architect under cl 14.1.1 of the said agreements. Such number of days is paramount for the purpose of computing the agreed liquidated damages as provided under cl 14.1.2 of the said agreements. However, before such number of days of delay could be ascertained and cl 14.1.2 could be invoked, one must observe cl 14.1.1 and determine whether the reason for the delay in delivery of vacant possession of the said property fall within the ambit of the proviso to cl 14.1.1 of the said agreements, which confers discretion to the developer's architect to grant fair and reasonable extension of time for delivery of vacant possession of the said property in the event that the delay is due to exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any other cause beyond the developer's control or by reason of the purchaser requiring the execution of any addition, works or alterations to the said property.

[12] In this instant case, the defendant is relying on the ground which is 'beyond the developer's control' to justify the delay in the delivery of vacant possession of the said property. As provided in the defendant's affidavit in opposition No 2 deposed by the developer's architect, the defendant averred that it was the delay by SESB in, inter alia, connecting the electricity supply from the main supply line to the said property's substation which caused the delay in the completion and delivery of vacant possession of the said property to the plaintiff. According to the developer's architect:

> ... I confirm that I have granted an extension to the Defendant pursuant to Clause 14.1.1 under the ten (10) sale and purchase agreements dated 16.08.2013 ... to 12.06.2017 to complete the said Project in conjunction with the extension that I had granted to the contractor of the said Project under the PAM Contract 2006 ...
>
> ...

> I further aver that I had granted the said extension to the Defendant as it was my professional opinion that the delay in the completion and delivery of vacant possession of the Property was a cause that is beyond the Defendant's control as it was caused by the delay on the part of SESB in supplying the permanent power supply which consequently delayed the testing and commissioning (T&C) and completion schedule ...

[13] The defendant submitted that as such connection of electricity rests solely within the domain of SESB, it is no longer within the control of the defendant as developer of the said property.

[14] However, I am more inclined to agree with the plaintiff who submitted that the delay cannot be brought within the ambit of the proviso to cl 14.1.1 of the said agreements. The proviso which is also known as force majeure clause must not be construed liberally and widely enough to exclude the defendant of any liability of its contractors.

[15] In the Court of Appeal case of *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783, the developer was held to remain liable to liquidated damages despite delay caused by the tardiness in laying of electrical and telephone cables by its subcontractors on the grounds that these subcontractors are under the control of the developer.

[16] In the Singapore's Court of Appeal case of *Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd* [1989] 2 MLJ 70, the developer was still found liable and was disallowed to rely on force majeure clause for failing to secure subsidiary title within the stipulated time provided in the agreement. It was held:

> We do not think a vendor is entitled to claim protection under the force majeure clause if he has under provided the time required to do the necessary things.

[17] In this present case, the defendant had covenanted to deliver vacant possession within 36 months from the date of obtaining the building plans as provided in the said agreements. Thus, it is incumbent on the defendant to ensure there are sufficient time to fulfill such obligation. However, despite having received the building plans approval on 24 September 2013, the defendant only paid the requisite connection fee to SESB in 2015. Hence, SESB could only commenced the installation works in 2015. Moreover, the SESB had confirmed in writing exhibited as 'TYC10' of the plaintiff's affidavit in reply that it has completed its task of providing electricity supply to the said property within three years from the date of the application of supply submitted, which is the reasonable time of completing the task. In the words of SESB:

A In present case, SESB had successfully provide the electricity supply to the said premise within three (3) years from the date of the application of supply submitted, which is reasonable time ...

B **[18]** Therefore, it was the defendant who delayed in completing the application for the installation of the permanent electricity supply from SESB. The defendant is not entitled to claim protection under cl 14.1.1 of the said agreements since it itself has under provided the time required to complete such installation.

C

[19] Upon detailed scrutiny of the one and only certificate of extension of time dated 4 August 2017 exhibited in the plaintiff's affidavit in support as 'TYC5' and in the defendant's affidavit in opposition No 1 as 'WOWL1', I agree with the plaintiff that such certificate was issued to the defendant's
D contractor, Messrs Eng Han Engineering Sdn Bhd pursuant to cl 23.4 of the construction agreement between the defendant and its contractor. In the event of any delay in the completion of works by the contractor, the defendant as the developer of the said property could always resort to the remedies provided in the construction agreement. Therefore, I find it absurd for the defendant to
E assert that the delay was beyond its control when it clearly has control over its contractor under the construction agreement.

[20] Furthermore, it was also expressly stated by the developer's architect in his letter dated 12 October 2017 to the learned counsel of the plaintiff
F exhibited in the plaintiff's affidavit in support as 'TYC7' that the extension of time was given pursuant to cll 23.4 and 23.8(q) of the agreement and conditions of PAM Contract 2006 (with quantities). This is the construction agreement entered between the defendant and the contractor unlike the said agreements which were between the plaintiff and the defendant.Therefore, I
G cannot agree with the defendant that there was an extension of time granted by the developer's architect pursuant to cl 14.1.1 of the said agreements.

[21] In the defendant's affidavit in opposition No 2, the developer's architect deposed to have granted extension of time to both the contractor and the
H defendant as the basis of the extension given arose from the same underlying cause, that is the delay on the part of SESB in supplying the permanent power supply. The defendant asserted that there is no requirement under the said agreements for a separate certificate of extension of time to be given in writing to the defendant as the extension granted under the construction agreement is
I equally applicable to the defendant under the said agreements.

[22] I find no merit in this submission of the defendant. The certificate of extension of time was issued under the construction agreement which the plaintiff is not privy too. The provisions under which the certificate was issued

are also distinct from cl 14.1.1 of the said agreements. The certificate was issued under cll 23.4 and 23.8(q) of the construction agreement which reads as follows:

Clause 23.4:

> When the Contractor has submitted sufficient particulars for the Architect's consideration, the Architect shall subject to 23.5, 23.6 and 23.8, consider the Contractor's submission and shall either reject the Contractor's application or issue a Certificate of Extension of Time within six (6) weeks from the receipt of sufficient particulars. The Architect may issue the written notice of rejection or the Certificate of Extension of Time before or after the Completion Date.

Clause 23.8(q):

> ... delay caused by any Appropriate Authority and Service Provider in carrying out, or failure to carry out their work which affects the Contractor's work progress, provided always that such delay is not due to any negligence, omission, default and/or breach of contract by the Contractor and/or Nominated subcontractors;

[23] By virtue of these clauses of the construction agreement, the contractor was clearly granted with the certificate of extension of time for 'delay caused by appropriate authority and service provider' which in this present case, the SESB. However, none of these terms and conditions is in parimateria or congruent with cl 14.1.1 of the said agreements. The grounds of 'delay caused by appropriate authority and service provider' is not listed as one of the grounds to justify the delay in delivery of vacant possession under the said agreements. Therefore, I failed to see how such certificate which was clearly issued under an agreement which the plaintiff is not privy to and for a distinct reason not provided in cl 14.1.1 of the said agreements, can be extended and deemed to have also been issued under cl 14.1.1 of the said agreements and therefore binding to the plaintiff and the defendant. I agree with the learned counsel for the plaintiff that to adopt such inclusive and liberal construction would subject the plaintiff to be without any recourse as the plaintiff is not privy to the construction agreement.

[24] In addition, I also find the deposition of the developer's architect in the defendant's affidavit in opposition No 2 and his explanation in exh 'WOWL3' in the defendant's supplementary affidavit in opposition to be an afterthought as it is a total departure from his previous explanation provided in the letter to the learned counsel for the plaintiff ('TYC7') with no explanation. Hence, such deposition is unsatisfactory and unreliable.

[25] Since it is apparent that no certificate of extension of time has ever been issued under cl 14.1.1 of the said agreements, there is no necessity to venture into the issue of format or form for issuance of such certificate under the same clause.

DAMAGES

[26] As pointed earlier, the computation of agreed liquidated damages as provided in the said agreements was undisputed. As a matter of fact, such computation was adopted by the defendant before releasing the payment for liquidated damages to the plaintiff in the sum of RM172,988.49 as compensation for the late delivery of the said property for 62 days.

[27] In the premises aforementioned, I found that the delay in delivery of the said property is for 338 days. Therefore, the computation of the agreed liquidated damages to the plaintiff will be in accordance to cl 14.1.2 and section 7 of Schedule A of the said agreements as provided in 'TYC4' of the plaintiff's affidavit in support.

CONCLUSION

[28] In the upshot, I grant an order in term of the plaintiff's originating summons under encl 1 with costs of RM3,000 to the plaintiff.

Order accordingly.

Reported by Nuzul Fitrie